In the

United States Circuit Court of Appeals

For the Ninth Circuit

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LUTHER WEEDIN, as United States Commissioner of Immigration at the Port of Seattle, Washington, District No. 28

Appellant.

vs.

ERICH PAUL HANS HEMPEL

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, JUDGE

BRIEF OF APPELLANT

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STATEMENT OF CASE.

Erich Paul Hans Hempel, the aspellee, is 28 years of age. He was born in Germany and is a citizen of that country. He was admitted into the United States at the port of New York, November 16, 1923. He was arrested by an

immigrant isnpector under authority of a warrant of arrest issued by the Secretary of Labor, April 15, 1927, charging that he had been found in the United States in violation of the immigration act of February 5. 1917, in that he was a person likely to become a public charge at the time of his entry, and that he had been convicted of or admitted the commission of a felony or other crime or misdemeanor involving moral turpitude, to wit: theft, prior to entry into the United States. He was thereafter accorded a hearing before an immigrant inspector and a deportation warrant was subsequently issued by the Secretary of Labor directing his deportation to Germany, for the same reasons set forth in the charges contained in the warrant of arrest. Thereafter a petition for a writ of habeas corpus was filed in the United States District Court for the Western District of Washington, Northern Division. After a hearing on an order to show cause why a writ of habeas corpus should not issue, such writ was granted by the Honorable Edward E. Cushman, District Judge, and subsequently an order releasing the petitioner, Erich Paul Hans Hempel, was also entered.

The Commissioner of Immigration duly filed his notice of appeal and proceedings to perfect said appeal were duly instituted. The following assignments of error were urged:

"I.The Court erred in holding, and deciding that a Writ of Habeas Corpus be awarded to the petitioner herein."

"II. The Court erred in holding, deciding and adjudging that the petitioner, Eric Paul Hans Hempel, be discharged from the custody of Luther Weedin, as United States Commissioner of Immigration at Seattle, Washington, Discrict No. 28."

"III. The Court erred in deciding, holding and adjudging that the petitioner, Erich Paul Hans Hemsel, was not subject to deportation, but was entitled to remain in the United States."

ARGUMENT.

Section 3 of the Immigration Act of February 5, 1917 (39 Stat. L. Ch. 29, p 874) reads as follows:

> "That the following classes of aliens shall be excluded from admission into the United States: *
> Person who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; * * *
> persons likely to become a public charge;" * * "

The appellee had been convicted in Germany of theft and had served 18 months in prison therefor, prior to coming to this country. He also admitted in his testimony that he had to carry money to the bank, and that

he kept that money for himself, and that he used some of said money. No contention was raised that the crime which he admitted having committed, and of which he was convicted, was not a crime involving moral turpitude. Consequently he belonged to a class of aliens mandatorily excluded by the above Section of the statute, had his guilt or conviction been made known to the immigration authorities at the time he applied for admission.

The fact that appellee had been convicted of theft in Germany, and the further fact that he had had two children by a woman to whom he was not married, and whom he had abandoned when he came to this country, justify the conclusion of the Secretary of Labor that he was a person likely to become a public charge at the time of his entry.

It has been held by various courts that aliens "likely to become a public charge" include not only those lacking means of support, but also those who are likely to be boarded at public expense for violation of our laws.

U. S. ex. rel Freeman vs. Williams, 175 Fed. 274 (D. C. N. Y.)
Lum Fung Yen ve. Frick, 233 Fed 393, Certorari denied, 242 U. S. 642, 61 L. Ed. 542.
Ex parte Riley, 17 Fed. (2d) 646 (D. C. Maine)

In the case of *Ex parte Hosaya Sakaguchi* 277 Fed. 913, this Court said:

> "If there were in this case any evidence whatever of mental or physical disability, *or any fact tending to show that the burden of supporting the appellant is likely to be cast upon the public, we should have no hesitation in saying that the conclusion of the board of special inquiry would be unassailable in a court.*" (Itales ours.)

See also: *Ex parte Tsunataro Machida*, 277 Fed. 239 (*D. C. Wash.*)
Ex parte Fragoso' 11 Fed. (2d)) 988, (D. C. Cal.)
Guimoud vs. Howes, 9 Fed. (2d) 412 (D. C. Maine)

Section 19 of the Imimgration Act of Februry 5th, 1917 provides that at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported (See first clause of said section.) The second clause also directs the deportation in like manner of "any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States."

The fifth clause of the same section reads as follows:

> "*Except as hereinafter provided*, any alien who is *hereafter* sentenced to imprisonment for a term of one year or more because of conviction *in this country of a crime involving moral terpitude committed within five years after the entry of the alien to the United States*, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction *in this country* of any crime inuolving moral terpitude, committed at any time after entry:" (Italics ours.)

The tenth clause of the same section reads as follows:

> "Any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral terpitude."

The section directs that both above classes of aliens shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.

The fifth clause relates solely to conviction of a *crime involving moral terpitude, committed after entry.*, and begins: "*Except as hereinafter provided.*" The tenth clause relates solely to conviction (or adm ssion of the commission,) *prior to entry, of a felony, or other crime or misdemeanor involving moral terpitude, and contains no proviso.* This appellee is clearly included in the latter class of aleins.

The second proviso in the same section reads as follows:

"Provided further, that the provision of this section respecting the deportation of aliens convicted of a *crime involving moral terpitude* shall not apply to one who has been pardoned, nor shall such deporta tion be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence, or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommondation to the Secretary of of Labor that such alien shall not be deported in pursuance of this act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment." (Italics ours.)

It will be noted that this proviso does not read *'provisions,"* and does not read "convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral terpitude," but is couched in the identical language of the 5th clause of the section: *"convicted of a crime involving moral terpitude."*

Congress must have had in mind both classes of aliens and the provisions for their deportation under Section 19, at the time the statutes was passed. If it had intended that the second proviso, supra, should apply to both provisions for deportation (contained in the 5th & 10th. clauses,) there is no reason why the statute should

read "*provision*," instead of "*provisions*," and should also read "*crime iuvolving moral terpitude*," instead of "felony or other crime or misdmeanor involving moral turpitude." The entire contex of the proviso shows plainly that it relates solely to aliens convicted of crime *committed after entry into the the United States*, and has no application to the tenth clause of the section. This was the view taken by the Circuit Court of Appeals for the Second Circuit in the case of *United States ex rel. Palermo vs. Smith*, 17 Fed. (2d) 534.

In his decision granting a Writ of Habeas Corpus to the present appellee (23 Fed. (2d) 949-956), District Judge Cushman entirely ignored the PUBLIC CHARGE feature of the case, and held, in effect, that the provisions of Section 19 of the Immigration Act of February 5, 1917, under which appellee was ordered deported, should be construed along with a stipulation which he quoted from the treaty between the United States and Prussia of 1828 (8 Stat. 378), which he held to be still in effect:

"* * * There shall be between the territories of the high contracting parties, a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall, mutually, have liberty to enter the ports, places, and rivers of the territories of each

party, wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs, and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing."

We are advised, however, that the State Department informed the Department of Labor that said treaty was terminated by the war between the United States and Germany for the reason that Article 289 of the Treaty of Versailles declared that all treaties between Germany and a Power which was at war with Germany were to be considered abrogated unless such Power gave notice to Germany to the contrary within six months after the ratification of the Treaty of Versailles, and that no such notice was ever given by the United States to Germany. The language of the Article shows that the view of the State Department is correct, at least in so far as treaties between Germany and the Allied and Associated Powers signatory to the treaty are concerned. The treaty of peace of August 25, 1921, (42 Stat. 1939), between the United States and Germany, stipulates that Germany accords to the United States all the rights, privileges and advantages

stipulated for the benefit of the United States in the Treaty of Versailles, notwithstanding the fact that such treaty was not ratified by the United States.

Section 5 of the Act of March 3, 1875 (18 Stat. 476-477) provided for the exclusion of "persons who are undergoing a sentence for a conviction in their own country of felonious crimes other than political or growing out of or the result of such political offenses, or whose sentence has been remitted on condition of their emigration."

Section 4 of the Act of August 3, 1882 (22 Stat. 214) provide for the exclusion and return to their own countries of "all foreign convicts except those convicted of political offenses."

The Act of March 3, 1891 (26 Stat. 1084) provided (Section 1) for the exclusion of "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude," with the proviso "that nothing in this act shall be construed to apply to or exclude persons convicted of a political offense, notwithstanding said political offense may be designated as a 'felony, crime, infamous crime or misdemeanor involving moral turpitude' by the laws of the land whence he came or by the court convicting."

Section 11 of the same Act provided for the deportation of aliens who come to the United States in violation of law.

The Act of March 3, 1903 (32 Stat. 1213) provided (Section 2) for the exclusion of "all persons who have been convicted of a felony or other crime or misdemeanor involving moral turpitude," with the proviso "that nothing in this Act shall exclude persons convicted of an offense purely political, not involving moral turpitude." Section 20 of the same Act provided for the deportation of aliens who come to the United States in violation of law.

Section 2 of the Act of February 20, 1907 (34 Stat. 898) provided for the exclusion of "persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude," with the proviso "that nothing in this act shall exclude, if otherwise admissible, persons convicted of an offense purely political, not involving moral turpitude." Section 21 of the same act provided for the deportation of aliens "found in the United States in violation of this Act * * *."

Section 3 of the Immigration Act of February 5, 1917, *supra*, contains the proviso "That nothing in this

act shall exclude, if otherwise admissible, persons convicted, or who admit the commission, or who teach or advocate the commission, of an offense purely political."

Thus Congress, in the whole line of Acts which it has passed on the matter of exclusion and deportation of aliens because of conviction of crime prior to entry, has been limiting the provisions and making exceptions, but in no case has it made an exception in cases of pardon except in Section 19 of the Act of February 5, 1917, as hereinbefore quoted. It said nothing regarding pardons in Section 3 of that Act, where the Act is dealing only with crimes committed abroad prior to entry.

The provision in the Act of 1917 as to crimes committed abroad covers not only those where there has been a conviction, *but also those where there is simply an admission.* If it be held that a pardon by a foreign government relieves the alien from deportation, the result would be that aliens who have been convicted and pardoned abroad would not be subject to deportation, but an alien who had committed a crime abroad, which had never become known, (in which case he would not have been convicted and pardoned) who in this country

admitted the commission of such crime, would be subject to deportation. It is not believed that Congress contemplated such an absurdity. The intention of Congress to render all aliens who had committed crimes abroad involving moral turpitude subject to exclusion and deportation, whether convicted or not, is amply evidenced by the insertion in the Acts of 1907 and 1917 of the provision regarding the admission of the commission of such crimes, and there is nothing in any of the various acts to indicate any intention to exempt from deportation aliens pardoned abroad for crimes committed abroad. The intention of Congress must control, as its right to deport aliens is as absolute and unqualified as its right to prohibit their entry *(Fong Yue Ting v. United States*, 149 U. S. 698, 707), and it has power to exclude aliens for any reason it may deem sufficient *(Chea Chan Ping v. United States*, 130 U. S. 581). An act of Congress would prevail over a prior treaty in direct conflict *(Ex Parte Wong Gar Wah*, 18 Fed. (2d) 250; *Jeu Jo Wan v. Nagle*, 9 Fed. (2d) 309).

The fact that appellee's passport was visaed by an American Consul in Germany did not give appellee any right to admission into the United States. That was a matter solely for the immigration officials. The

appellee says that the American Consul was apprised of his criminal record. Whether or not such was the case does not matter. The immigration officials at New York evidently were not apprised of such record, or the appellee would not have been admitted.

The letter of Commissioner Weedin from which the District Judge quotes (pp. 16-17 of the transcript) is error, as there was no such document as an "Immigration Visa" prior to the Immigration Act of 1924 (43 Stat. L. Ch. 190, p. 153).

The statements of the District Judge, and the various citations in his opinion, with respect to the effect of a pardon by the President, or other pardoning officials in this country, do not appear to have any direct bearing on the present case.

We maintain that the appellee is subject to deportation on both charges contained in the deportation warrant, and that the District Court was in error in granting the Writ of Habeas Corpus and ordering him released from the custody of the Commissioner of Immigration.

Respectfully submitted,

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